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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JAMES GRIFFIN LANE,

Petitioner,

v.

FEDERICO F. PENA, SECRETARY OF TRANSPORTATION, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICI CURIAE* AMERICAN ASSOCIATION OF RETIRED PERSONS, AMERICAN COUNCIL OF THE BLIND, BAZELON CENTER FOR MENTAL HEALTH LAW, CALIFORNIA WOMEN'S LAW CENTER, CHINESE FOR AFFIRMATIVE ACTION, DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, EMPLOYMENT LAW CENTER, EPILEPSY FOUNDATION OF AMERICA, LAMBDA LEGAL DEFENSE AND EDUCATION FUND, NATIONAL ALLIANCE FOR THE MENTALLY ILL, NATIONAL ASSOCIATION OF THE DEAF, NATIONAL ASSOCIATION OF PROTECTION & ADVOCACY SYSTEMS, NATIONAL COUNCIL ON INDEPENDENT LIVING, NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, NATIONAL PARENT NETWORK ON DISABILITIES, NEW YORK LAWYERS FOR THE PUBLIC INTEREST, THE ARC, UNITED CEREBRAL PALSY ASSOCIATIONS, WESTERN LAW CENTER FOR DISABILITY RIGHTS, AND WORLD INSTITUTE ON DISABILITY, IN SUPPORT OF PETITIONER

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BRIEF OF AMICI CURAIE AMERICAN ASSOCIATION OF RETIRED PERSONS, ET AL. IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*[1]

Amici American Association of Retired Persons, *et al.* are twenty organizations, including thirteen advocacy and service organizations nationwide that represent and serve the 49 million Americans with disabilities and their families, plus seven legal and civil

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[1] This brief is filed with consent of the parties. Copies of the consent letters are on file with the Clerk.

rights organizations representing and serving the members of other minority communities and women in the United States. Each organization works to eliminate historical stereotypes, prejudices and the resulting discriminatory practices and policies that serve to exclude Americans with disabilities, members of other minority communities, and women from participating as valued and contributing members of our society. *Amici* include premier law and policy organizations that are nationally respected for their expertise in federal non-discrimination law. As such, *amici* are often called on by policymakers, legislators and courts to assist in the development and interpretation of federal civil rights statutes.

Amici know through experience that the availability of monetary damages to redress violations of civil rights is essential to enforce the guarantee of equal citizenship that has been provided to Americans with disabilities, as well as other minorities and women, by federal law. In this case, the Court will resolve the question of whether suit for monetary damages will lie against the federal government under Section 504 of the Rehabilitation Act of 1973. Given the broad reach and scope of federal activities, and the pivotal leadership role assigned to the federal government under national civil rights laws, *amici* recognize that this Court's decision will have a substantial impact on whether the federal mandate of nondiscrimination based on disability will be realized. *Amici* therefore submit the following brief in support of petitioner.

Amicus American Association of Retired Persons (AARP) is a non-profit membership organization of persons age 50 and older that is dedicated to addressing the needs and interests of older Americans. On behalf of its 32 million members, AARP seeks through education, advocacy, and service to enhance the quality of life for all by promoting independence, dignity, and purpose. As part of its advocacy work, AARP has participated as

amicus curiae in numerous cases regarding the interpretation of federal nondiscrimination statutes.

Amicus American Council of the Blind (ACB) is the nation's largest non-profit membership organization of people who are blind and visually impaired. ACB seeks to ensure that blind individuals have the opportunity to participate fully in all aspects of American life, and to that end works to promote strong state and federal nondiscrimination laws.

Amicus Bazelon Center for Mental Health Law is a Washington, D.C.-based public interest organization founded in 1972 to advocate the rights of children and adults with mental disabilities. It has brought major cases decided by this Court establishing the rights of people with mental disabilities, and it has participated as *amicus curiae* in front of this Court in more than a dozen additional cases.

Amicus California Women's Law Center (CWLC) is a private, non-profit public interest law center established in 1989 to address the comprehensive civil rights of women and girls. Consistent with this mission, CWLC provides training, technical assistance, advocacy support and legal assistance to legal services agencies, community based organizations, attorneys and policymakers. Since its inception, CWLC has placed a strong emphasis on addressing the rights of women and girls who are the poorest and most marginalized in our communities, and who suffer discrimination based on gender and class, race, disability, age, sexual orientation, or other minority status.

Amicus Chinese for Affirmative Action (CAA) is a non-profit, membership supported organization that advocates, defends and promotes the civil and political rights of Chinese and Asian Americans within the context of, and in the interest, of advancing multiracial democracy in the United States. CAA is a 1200 membership strong organization that believes in equal access and equal opportunities to all people, regardless

of race gender, disability, age, religion, economic, or social status.

Amicus Disability Rights Education and Defense Fund (DREDF) is the nation's premier law and policy center dedicated to protecting and advancing the civil rights of people with disabilities. DREDF is nationally recognized for its expertise in the interpretation of federal disability civil rights laws.

Amicus Employment Law Center (ELC) is a project of the Legal Aid Society of San Francisco, a private, non-profit organization. ELC's primary goal is to improve the working lives of disadvantaged people. Since 1970, ELC has represented clients in individual and class action cases covering a broad range of employment-related issues, including discrimination on the basis of race, gender, age, disability, pregnancy, citizenship, sexual orientation and national origin.

Amicus Epilepsy Foundation of America is a national non-profit corporation founded in 1968 to advance the opportunities of the two million persons with epilepsy. The Foundation has a long-standing commitment to eliminating the stereotypes and prejudices that serve to exclude persons with epilepsy from society.

Amicus Lambda Legal Defense and Education Fund (Lambda) is the nation's oldest and largest non-profit organization dedicated to the civil rights of lesbians, gay men and all people with HIV/AIDS. Since filing the country's first AIDS discrimination case in 1983, Lambda has had a continuing involvement in the development of fair and rational policies relating to HIV/AIDS. Through its participation in both state and federal HIV/AIDS discrimination cases, Lambda has had extensive experience with disability civil rights statutes.

Amicus National Alliance for the Mentally Ill (NAMI) is a national organization with 225 state and local affiliates. As a mutual support, self-help and advocacy organization, NAMI provides programs in

education, community service, vocational education and support to over 130,000 persons with mental illness and their families each year.

Amicus National Association of the Deaf (NAD) is a national non-profit organization whose members are deaf adults, parents of deaf children, and professionals in the area of service to individuals who are deaf. NAD is the largest consumer organization of people who are deaf in the United States.

Amicus National Association of Protection and Advocacy Systems (NAPAS) is the national voluntary membership organization of the Protection and Advocacy Systems and Client Assistance Programs. The member agencies of NAPAS are designated by the Governor of their state or territory, and are federally mandated to pursue legal, administrative, and other remedies to protect and promote the legal rights of persons with disabilities. In FY 94, these agencies provided services to nearly 70,000 persons, reflecting the full spectrum of disabling conditions.

Amicus National Council on Independent Living (NCIL) was established in 1982 as the national voice of independent living centers, which provide advocacy, information and referral services, independent living skills training and peer counseling to people with all disabilities, and which are governed and controlled by people with different types of disabilities. NCIL was organized in part to support independent living centers by conducting and coordinating the national advocacy efforts of the independent living movement. Towards that end NCIL works to ensure that the civil rights of people with disabilities are strengthened and protected by law.

Amicus National Employment Lawyers Association (NELA) is a voluntary organization, founded in 1985, of over 2,600 attorneys who specialize in representing individuals in controversies arising out of the workplace. It is the country's only professional

membership organization comprised of lawyers who represent employees in cases involving employment discrimination, employee benefits, wrongful discharge, and other employment-related matters. NELA has devoted itself to supporting precedent-setting litigation and remedial legislation affecting the rights of individuals in the workplace.

Amicus National Parent Network on Disabilities (NPND) is a national membership organization that represents over 500,000 parents and families who have a member with a disability. NPND's mission is to speak as a collective voice representing the perspectives, needs and interests of parents and family members of persons of all ages with a disability.

Amicus New York Lawyers for the Public Interest (NYLPI), through its Disability Law Center and its *pro bono* clearinghouse of 68 private law firms and corporate law departments, advocates for the rights of persons with disabilities across New York State. NYLPI has appeared as *amicus curiae* and represented *amicus curiae* before this Court in several cases involving the rights of persons with disabilities.

Amicus The Arc is the largest voluntary organization in the country devoted to securing the rights of, and effective services for, approximately seven million Americans with mental retardation. The Arc has a national membership of more than 120,000 people, including persons with mental retardation and their parents, and has approximately 1,100 state and local chapters throughout the country. Members of Congress, state legislatures, rulemaking authorities, and the courts regard The Arc as a leading advocate for citizens with mental retardation.

Amicus United Cerebral Palsy Associations (UCPA) is a national non-profit voluntary health organization formed in 1949. UCPA assists its 162 affiliates throughout the country in the provision of rehabilitation and related direct services, such as

education and advocacy programs, and other activities designed to promote the welfare of people with disabilities.

Amicus Western Law Center for Disability Rights (WLCDR) is a Los Angeles based public interest legal services organization. For the past two decades WLCDR has dedicated itself to the preservation and advancement of the civil rights of people with disabilities.

Amicus World Institute on Disability (WID) is a private, non-profit corporation focusing on major policy issues from the perspective of the disabled community. Founded in 1983 by persons who have been deeply committed to the independent living movement, WID functions as a research center and as a resource for information, training, public education and technical assistance.

SUMMARY OF ARGUMENT

In enacting and amending Section 504 of Rehabilitation Act of 1973, Congress has unequivocally expressed its intent to waive sovereign immunity and hold the federal government liable for monetary damages caused by discrimination on the basis of disability. It is well settled that a private right of action, with monetary damages available, will lie against non-federal parties under Section 504. *See Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992), and its progeny. Plain statutory language and legislative history establish that in the 1978 Amendments to Section 504 Congress sought to equalize treatment of federal and non-federal parties. *See, e.g., Doe* v. *Attorney General of the United States*, 941 F.2d 780, 792 (9th Cir. 1991). Congressional intent to unify the enforcement scheme of Section 504 is further evidenced by the 1986 Amendments to Section 504, which clarified that monetary damages are available against any public

agency. The Congressional intent to ensure consistency among Section 504 defendants was also confirmed by legislative history accompanying the 1992 reauthorization of the Rehabilitation Act, in which Senator Jeffords, a primary author of the 1978 Amendments, approved cases that confirmed the equality of remedies as between federal and non-federal defendants. 138 Cong. Rec. 16,609 (Oct. 5, 1992).

In light of this clear Congressional purpose, the D.C. Court of Appeals erred in holding that *United States* v. *Nordic Village, Inc.*, 503 U.S. 30 (1992), requires judgment for the government in this case. Petitioner has demonstrated the "unequivocal waiver" of sovereign immunity as required by *Nordic Village* and numerous prior decisions of this Court. To the extent that *Nordic Village* changed the law -- in 1992 -- by holding that legislative history has no bearing on the construction of such waivers, it is inapplicable to construction of Congress's intent in 1978 in amending Section 504. As this Court confirmed in *Franklin*, *supra*, Congressional intent must be gleaned from the state of the law at the time Congress acted.

Lastly, a damages remedy against the federal government is necessary to implement legislative intent to deter federal misconduct, ensure effective enforcement, and provide for adequate redress of disability rights violation. Without damages available to enforce the Congressional mandate, Section 504's promise of federal non-discrimination rings hollow as a practical matter. Statutory language, legislative history, and public policy all dictate that Section 504 damage suits will lie against the federal government. The Court should reverse the D.C. Circuit's erroneous holding to the contrary.

I. RECOGNITION OF A DAMAGES REMEDY AGAINST THE FEDERAL GOVERNMENT FOR VIOLATIONS OF SECTION 504 IS NECESSARY TO IMPLEMENT CONGRESSIONAL INTENT.

As discussed below, this Court has recognized that monetary damages are available under Section 504 to remedy discrimination by recipients of federal financial assistance. *See Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992).[2] By adding the federal government to Section 504 in 1978, Congress intended to ensure that people with disabilities who suffered discrimination by the federal government would have the same rights and remedies as those who were discriminated against by private entities. As Senator Jeffords, author of the 1978 Amendments has stated, "[t]o construe the statute otherwise would be the height of hypocrisy, expecting private entities to bear a burden that the federal government itself is unwilling to carry." 138 Cong. Rec. S16,609 (1992).

A. Section 504 Created A Broad Nondiscrimination Mandate Enforceable Against Recipients Of Federal Financial Assistance Through A Private Right Of Action, With Monetary Damages Available.

As originally enacted in 1973, Section 504 of the Rehabilitation Act prohibited discrimination on the basis

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[2] The specific question presented and decided in *Franklin* was whether compensatory damages are available under Title IX of the Education Amendments of 1972. However, because both Title IX and Section 504 incorporate the remedies of Title VI of the Civil Rights Act of 1964, the *Franklin* Court's decision effectively resolved a remedial issue applicable to all three statutes, and has been so regarded by lower courts since 1992. *See, e.g., J.L. & K.P.* v. *Social Security Admin.*, 971 F.2d 260, 264 (9th Cir. 1992); *Justice* v. *Pendleton Place Apartments*, 40 F.3d 139, 142 (6th Cir. 1994); *Pandazides* v. *Virginia Bd. of Educ.*, 13 F.3d 823, 830 (4th Cir. 1994); *Rogers* v. *Magnet Cove Public Schools*, 34 F.3d 642, 645 (8th Cir. 1994); and *Waldrop* v. *Southern Co. Services, Inc.*, 24 F.3d 152, 156-157 (11th Cir. 1994).

of disability by non-federal entities receiving federal financial assistance, using statutory language patterned after Section 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-1 (relating to race, color or national origin), and Section 901 of the Education Amendments of 1972, 42 U.S.C. § 1683 (relating to sex). *See* Pub. L. No. 93-112, 87 Stat. 355 (1973), codified at 29 U.S.C. § 794.

As noted in Congressional Committee Reports accompanying later amendments to this legislation, Section 504 thus "constitute[d] the establishment of a broad governmental policy" against disability discrimination by federally-funded parties. S. Rep. No. 1297, 93d Cong., 2d Sess. 40, *reprinted in* 1974 U.S. Code Cong. & Admin. News 6373, 6390. Subsequent Congressional action with respect to Section 504---including amendments in 1974, 1978, 1986 as to remedies---has been directed towards reaffirming and strengthening this nondiscrimination mandate, and its enforcement scheme.

In the first set of amendments to the Act in 1974, Congress expressed its intent that enforcement of Section 504 "permit a judicial remedy through a private action." S. Rep. No. 1297, 93d Cong., 2d Sess. 40, *reprinted in* 1974 U.S. Code Cong. & Admin. News 6373, 6391. This Congressional commitment to a Section 504 judicial enforcement scheme was reaffirmed in 1978, with the incorporation of Title VI remedies into the Rehabilitation Act. Section 505(a)(2), 29 U.S.C. § 794a(a)(2).

In evaluating the body of federal civil rights statutes of which Section 504 is a part, this Court has confirmed the availability of the full panoply of remedies, including monetary damages. *See Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992). The government does not dispute the availability of damages in Section 504 cases against recipients of federal financial

assistance, but argues that it should be exempted from the same remedies.[3]

B. The 1978 Amendments To Section 504 Were Intended To Put The Federal Government On "Equal Footing" With Non-Federal Parties As To Coverage, Enforcement And Remedies

As the Ninth Circuit has correctly noted, plain statutory language, buttressed by the legislative history of the Rehabilitation Act as articulated by Congress over the past two decades, makes it "starkly clear" that the 1978 Amendments to Section 504 were "intended to put the federal government on equal footing with everyone else" with respect to both the requirements and enforcement of the disability nondiscrimination mandate. *Doe v. Attorney General of the United States*, 941 F.2d 780, 792 (9th Cir. 1991); *see also, J.L. & K.P. v. Social Security Admin.*, 971 F.2d 260 (9th Cir. 1992).

This 1978 legislative intent to equalize treatment of federal and non-federal parties is amply demonstrated by the fact that Congress elected to specify the coverage of federal agencies not only in the same section of the Rehabilitation Act as that which covers private entities (Section 504), *but in the same sentence of that same section of the law.*[4] *See also, Doe, supra,* 941 F.2d at 790.

In addition to extending coverage to the federal government, as this Court has recognized, the 1978 Amendments were also "'designed to *enhance* the ability

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[3] In the district court, respondents did "not contest" that monetary damages are available for violations of Section 504 by private parties and states. Appendix to Petition for Certioriari at 58a.

[4] In the words of the *Doe* court, "[t]he statute's internal approach is to prohibit discrimination against the handicapped by anyone and to install a unitary enforcement mechanism" that would shelter victims of federal, as well as private, discriminators. 941 F.2d at 791.

of handicapped individuals to assure compliance'" with the statute, explicitly providing for heightened judicial enforcement of the Rehabilitation Act. *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 635 (1984) (quoting S. Rep. No. 890, 95th Cong., 2d Sess., 18 (1978)) (emphasis added).

The mechanism through which this was accomplished was the enactment of Section 505(a)(2), 29 U.S.C. § 794a(a)(2), which made Title VI remedies available under Section 504, as well as the enactment of Section 505(b), 29 U.S.C. § 794a(b), which allows a prevailing party, other than the United States, to recover reasonable attorneys' fees in Section 504 cases.[5] This latter provision was specifically designed to continue the availability of private causes of action under Section 504, and to facilitate rather than impede private enforcement of Section 504. Congress thus reconfirmed that private enforcement of the rights conferred by the Rehabilitation Act is an important and necessary aspect of ensuring that these rights are vindicated, and provided for uniform enforcement against all parties subject to the law. S. Rep. No. 890, 95th Cong., 2d Sess 19 (1978); H.R. Rep. No. 1149, 95th Cong., 2d Sess. 21 (1978).[6]

Consequently, it is clear that in amending Section 504 in 1978, Congress was seeking to equalize treatment

[5] In addition to demonstrating the general availability of judicial enforcement of Section 504, the attorneys' fees provision containing the language "other than the United States" is a significant indication that Congress contemplated the presence of the federal government as a party to litigation under Section 504, with the sole exception to uniformity in judicial enforcement being that the U.S. would not be entitled to attorneys' fees as a prevailing party. *See also* discussion in *Doe, supra*, 941 F.2d at 790.

[6] The 1978 Senate Report states that an attorneys' fee provision was necessary to assist "'disabled people, who desperately need to vindicate their rights through the courts.'" S. Rep. No. 890, 95th Cong., 2d Sess. 19 (1978).

of federal and non-federal parties under a statute that it intended, and clearly regarded, as providing for a private right of action, and for a monetary damages remedy.[7]

II. THE CONGRESSIONAL INTENT TO WAIVE SOVEREIGN IMMUNITY IN SECTION 504 CASES AGAINST THE FEDERAL GOVERNMENT IS CLEAR AND UNEQUIVOCAL.

A. The 1978 And 1986 Amendments And Their Legislative History Make Clear That Congress Intended To Allow Private Suits And Monetary Damages To Implement Section 504, Against Recipients Of Federal Financial Assistance And The Federal Government Alike

Through the 1978 Amendments to Section 504 equalizing federal and non-federal remedies, Congress has clearly effected the necessary "unequivocal expression" of waiver of federal sovereign immunity for damages, as required by the body of case law recently including *United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992).

While Congress will be understood to have waived the federal government's sovereign immunity from suit only if the waiver is "unequivocally expressed," *id.* at 33, this Court has also stated that it

[7] This interpretation of the 1978 Amendments is consistent with their overall purpose, as expressed by the legislators enacting them. The sponsors and proponents of the Senate bill repeatedly assured their colleagues that the purpose and effect of the legislation was to expand the opportunities for people with disabilities. Senator Randolph, the floor manager, opened the debate by asserting that "*[a]ll* of the provisions of this bill...not only provide opportunities to handicapped Americans to aspire to certain goals but also provide the means by which they can reach those goals." 124 Cong. Rec S30,303 (1978) (emphasis added).

will not "'assume the authority to narrow the waiver that Congress intended,' or construe the waiver 'unduly restrictively'". *Irwin* v. *Dep't. of Veterans Affairs,* 498 U.S. 89, 94 (1990) (quoting *Bowen* v. *City of New York,* 476 U.S. 467, 479 (1986) (internal citations omitted)).[8]

In this case, both the language of the statute itself and its legislative history confirm Congressional intent to waive sovereign immunity. As discussed above, Congress added the federal government to the same section of the law as recipients of federal financial assistance and made the same remedies applicable. As this Court held in *Franklin* v. *Gwinnett County, supra*, Congress intended the full panoply of remedies to be available. Hence, on its face, Section 504, and Section 505's incorporation of Title VI remedies, confer a damages remedy against the federal government. There is no indication in the language of the statute indicating

[8] Relatively broad construction of waivers, and corresponding narrow construction of exceptions to waivers, has often been applied to cases brought against the federal government under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.* *See, e.g., Irwin, supra,* 498 U.S. 89 (1990) (equitable tolling rule applicable to suits against private defendants also applies to suits against the federal government under Title VII); *Loeffler v. Frank,* 486 U.S. 549 (1988) (prejudgment interest may be awarded in a suit against the U.S. Postal Service under Title VII); *Chandler v. Roudebush,* 425 U.S. 840 (1976) (plaintiff's right to trial *de novo* extends to suit against federal government as well as against non-federal parties).

Moreover, in cases in which this Court has ruled to the contrary in Title VII cases, the holdings have been grounded in clear evidence that Congress did not intend equal treatment of federal and non-federal parties. *See, e.g., Library of Congress v. Shaw,* 478 U.S. 310 (1986) (Congressional awareness of long-standing "no interest" rule against the federal government precludes finding waiver as to interest absent explicit statement to that effect in Title VII); *Brown v. General Servs. Admin.,* 425 U.S. 820 (1976) (precisely drawn, detailed statutory structure and legislative history of Title VII provides clear evidence that Congress intended it to be exclusive judicial remedy for claims of discrimination in federal employment).

that Congress intended different remedies to apply to federal and non-federal defendants. As discussed above, the 1978 amendments were "designed to *enhance* the ability of handicapped individuals to assure compliance" *Consolidated Rail Corp. v. Darrone,* 465 U.S. 624, 635 (1984) (quoting S. Rep. No. 890, 95th Cong., 2d Sess. 18 (1978)) (emphasis added) against both the federal government and recipients of federal financial assistance.[9]

Moreover, as argued in Petitioner's brief the 1986 Amendments to Section 504 further clarified that damages were available against "*any* public agency." The amendment does not exempt the federal government and cannot possibly be interpreted to convey a dual standard as between federal and non-federal entities. *See* Petitioner's brief at 21-23.

In applying the rule of law requiring "unequivocal expression" of Congressional waivers of sovereign immunity, judicial statutory construction of the scope of such waivers has historically taken into consideration legislative history and Congressional intent of precisely the kind on which the Ninth Circuit based its decisions in *Doe* and *J.L.*.[10]

[9] Since *Nordic Village, supra,* this Court has stated that:

"if it were quite clear from the balance of the statute" that a particular governmental liability was intended, statutory failure to specify such liability "might be treated as a statutory gap that the courts could fill by decisional law." *Smith v. United States,* 507 U.S. 197 (1993).

[10] *See, e.g., Ardestani* v. *INS,* 502 U.S. 129 (1991); *Loeffler v. Frank,* 486 U.S. 549 (1988); *Library of Congress v. Shaw,* 478 U.S. 310 (1986); *Franchise Tax Board of California v. United States Postal Serv.,* 467 U.S. 512 (1984); *United States v. Mitchell,* 445 U.S. 535 (1980); *United States v. Kubrick,* 444 U.S. 111 (1979); *Brown v. General Servs. Admin.,* 425 U.S. 820 (1976); *Chandler v. Roudebush,* 425 U.S. 840 (1976); *United States v. King,* 395 U.S. 1 (1969).

Moreover, this Court has particularly emphasized the need to examine legislative history when faced with questions concerning the scope of Section 504 and its remedial provisions, and has consistently refused to interpret Section 504 as containing limitations inconsistent with clear Congressional purposes. As this Court stated in *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624, 633 n.13 (1984), "language as broad as that of § 504 cannot be read in isolation from its history and purposes." *See also*, *Alexander* v. *Choate*, 469 U.S. 287 (1985).[11]

Nevertheless, in the reasoning of the D.C. Circuit in *Dorsey v. United States Dep't. of Labor*, 41 F.3d 1551 (D.C. Cir. 1994), the legislative history to which the Ninth Circuit looked in *Doe* and *J.L.* must be disregarded, because this Court's 1992 decision in *Nordic Village* has changed the law by holding that legislative history has no bearing on construction of waivers of federal sovereign immunity.

Such a change in law, if indeed it has occurred, is clearly inapplicable to the interpretation of Section 504, given that any pronouncement to disregard legislative history is directly contrary to prior judicial interpretations of which Congress can be presumed to have been aware when it enacted the Rehabilitation Act in 1973, and amended it in 1974, 1978, 1986 and 1990.

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11 In *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624 (1984), based on legislative history this Court held that Congress had not intended to incorporate into Section 504 the employment limitation of Section 604 of Title VI.

In *Alexander v. Choate*, 469 U.S. 287 (1985), this Court addressed the question of whether Section 504 prohibited disparate-impact discrimination. Despite the holding of a majority of the Court in *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983) that Title VI itself did not prohibit disparate-impact discrimination, the *Alexander* Court declined to extend this limitation on the scope of Title VI to Section 504, again basing decision on the legislative history of Section 504.

This Court has explicitly recognized that in determining Congressional intent, "we evaluate the state of the law when the legislature passed" the statute in question. *Franklin, supra*, 503 U.S. at 71. As the *Franklin* Court noted, in enacting and amending the nondiscrimination laws of the 1960s and 1970s, Congress legislated against the backdrop of a clear and long-standing "traditional presumption in favor of all appropriate relief," as well as an assumption that legislative history and Congressional intent would be taken into account in assessing available remedies. *Id. See also*, *Cannon* v. *University of Chicago,* 441 U.S. 677 (1979); *Cort* v. *Ash,* 422 U.S. 66 (1975) (identifying legislative history and intent as critical to judicial determination of whether a remedy has been created by statute).

Pursuant to the applicable body of case law regarding the construction of Congressional waivers of federal sovereign immunity, the statutory language and legislative history of the 1978 and 1986 Amendments to Section 504 must be read to subject the federal government to suit for monetary damages.

Any other interpretation would result in a "crabbed construction" that "overlooks our admonition that waiver of sovereign immunity is accomplished not by `a ritualistic formula'; rather intent to waive immunity and the scope of such a waiver can only be ascertained by reference to underlying congressional policy." *Franchise Tax Board, supra,* 467 U.S. at 521 (citing *Keifer & Keifer* v. *Reconstruction Finance Corp.* 306 U.S. 381, 389 (1939)). *See also*, *Dellmuth* v. *Muth,* 491 U.S. 223, 233 (1989) (Scalia, J. concurring) (Congressional elimination of state sovereign immunity is not precluded even if statutory text lacks explicit reference to such immunity or to the Eleventh Amendment).

B. Legislative History To The 1992 Reauthorization Of The Rehabilitation Act Expressly Reaffirmed The Availability Of A Monetary Damage Remedy Against The Federal Government, And Approved The Ninth Circuit's Decisions In *Doe* and *J.L.*

The Congressional intent to waive sovereign immunity and extend all of the protections of Section 504 to victims of discrimination by the federal government has been reaffirmed by the legislative history accompanying the 1992 reauthorization of the Rehabilitation Act of 1973.

In that history, Senator Jeffords, the primary author of the 1978 Amendments to Section 504, endorsed the statutory interpretations made by the Ninth Circuit in the *Doe* and *J.L.* cases, noting that any other interpretation would be:

> in direct contrast to rulings in the ninth circuit in *Doe* v. *Attorney General of the United States,* 941 F.2d 780 (9th Cir. 1991) and *J.L* v. *Social Security Administration,* 92 C.D.O.S. 6222 (9th Cir. July 15, 1992), and the intent of Congress in 1978 to cover the Federal Government with the same antidiscrimination mandate which is applied to private recipients of Federal financial assistance. [138 Cong. Rec. S16,609 (Oct. 5, 1992)].

Senator Jeffords expressly endorsed the Ninth Circuit's pronouncement in the *Doe* case that:

> [t]he Rehabilitation Act's legislative history... demonstrates Congress's intent...to permit enforcement [against the federal government] through the same means available against private parties; enforcement in the courts with *damages* and equitable remedies. [*Id.*, quoting *Doe, supra,* 941 F.2d at 793-794 (emphasis added)].

The 1992 legislative history thus confirms that the "language of the 1978 amendments is sufficient on its face to confer" a "private right of action against the Federal Government." 138 Cong. Rec. S16,609. Indeed, in the words of Senator Jeffords, "[t]o construe the statute otherwise would be the height of hypocrisy, expecting private entities to bear a burden that the Federal Government itself is unwilling to carry." *Id.*

In short, it is clear that the text, statutory structure and legislative history of Section 504 are sufficient to provide the required "unequivocal expression" of waiver of federal sovereign immunity to suit for monetary damages. The District of Columbia Circuit Court of Appeals was thus in error in holding that suit for monetary damages will not lie against the federal government under Section 504. This Court should reverse the D.C. Circuit's erroneous holding, and afford petitioner the damages remedy to which he is clearly entitled by Congressional mandate.

III. FAILURE TO RECOGNIZE A DAMAGES REMEDY DEFEATS CONGRESSIONAL INTENT THAT PEOPLE WITH DISABILITIES BE AFFORDED EFFECTIVE REMEDIES UNDER SECTION 504.

Contrary to Congressional intent to "enhance the ability of handicapped individuals to ensure compliance" S. Rep. No. 890, 95th Cong. *supra*, at 18, limiting the relief available to people with disabilities who are victims of unlawful discrimination at the hands of the federal government results in inconsistent and inadequate redress of the harm caused by discrimination. Federal government programs and regulations pervade the lives of people with disabilities, requiring that the federal government be an exemplar in its efforts to integrate people with disabilities into the mainstream of society. When federal officials discriminate in administering such programs, equitable remedies such as injunctions against future discrimination cannot provide effective recompense to the individual aggrieved. While

prospective relief may eliminate similar violations in the future, it does nothing to ameliorate the tangible harm suffered by individual plaintiffs.

Federal government activities, programs and regulations have significant bearing on the lives of people with disabilities. People with disabilities are beneficiaries of a wide variety of government programs. They are students in federal educational institutions, volunteers in the Peace Corps, and trainees in Jobs Corps programs.[12] People with disabilities are also directly affected by the vast array of federal regulatory activity, which can have a profound impact on the opportunities available to people with disabilities.[13]

The availability of damage awards in civil rights suits serves both the broad public purpose of eliminating discrimination throughout society,[14] and the private

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12 *See, e.g., Dorsey* v. *United States Dep't of Labor*, 41 F.3d 1551 (D.C. Cir. 1994).

13 For example, in the past several years the U.S. Department of Transportation has undertaken a review of physical qualification standards for interstate commercial drivers of certain classifications of motor vehicles, to ensure that they are consistent with the requirements of Section 504 of the Rehabilitation Act of 1973, and the Americans with Disabilities Act of 1990. 42 U.S.C. §§ 12101 *et seq*. This review was undertaken pursuant to the explicit direction of Congress as contained in legislative history to the ADA. *See* S. Rep. No. 116, 101st Cong., 1st Sess. 27-28 (1989); H.R. Rep. No. 485 (Part 2), 101st Cong., 2d Sess. 57 (1990). As a result of this review, the Federal Highway Administration has proposed modifications to its physical requirements for drivers of commercial motor vehicles. *See* 61 Fed. Reg. 609 (Jan. 8, 1996).

14 Discrimination "negates the billions of dollars we invest each year to educate our children and youth with disabilities and train and rehabilitate adults with disabilities." *See* S. Rep. No. 116, 101st Cong. 1st Sess., 18 (1989), H.R. Rep. No. 485 (Part 2), 101st Cong., 2d Sess., 46 (1990).

purpose of making victims whole.[15] In allowing damages awards, this Court has frequently noted the fundamental remedial principle that the possibility of retrospective compensation to victims provides an incentive to comply with legislation.[16] Especially where governmental entities are involved, potential damages liability may also have the beneficial effect of overcoming bureaucratic inertia, and spurring administrative action to end clearly discriminatory practices.

As this Court has acknowledged, the principle that damages are critical to effective enforcement of civil rights laws applies with even greater force to the government:

> A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees, and the importance of assuring its efficacy is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed." [*Owen* v. *City of*

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15 *See McKennon* v. *Nashville Banner Publishing Co.*, 115 S. Ct. 879, 884 (1995) ("Deterrence is one object of these [anti-discrimination] statutes. Compensation for injuries caused by the prohibited discrimination is another."); *Hensley* v. *Eckerhart*, 461 U.S. 424, 445 n.4 (1983) ("the public as a whole has an interest in the vindication of [civil] rights...over and above the value of a civil rights remedy to a particular plaintiff").

16 *See, e.g., Carlson* v. *Green*, 446 U.S. 14, 21 (1980) ("It is almost axiomatic that the threat of damages has a deterrent effect"); *Owen* v. *City of Independence, Mo.*, 445 U.S. 622, 651-52 (1980) (finding that liability will create an incentive for officials to protect civil rights, and that the damage remedy will encourage policymakers to minimize the possibility of discriminatory action); *Smith* v. *Wade*, 461 U.S. 30, 50 (1983) ("we assume, and hope, that most officials are guided primarily by the underlying standards of federal substantive law -- both out of devotion to duty, *and in the interest of avoiding liability for compensatory damages*." (emphasis added)).

Independence, Mo., 445 U.S. 622, 651 (1980) (holding municipalities liable for damages for civil rights violations)].

Congress has similarly recognized that private enforcement of civil rights statutes---and remedial provisions like damages and attorneys' fees that promote such enforcement---are critical to effective implementation of nondiscrimination mandates.[17] Such remedial provisions are a necessary counterweight to the special barriers that members of minority communities, including persons with disabilities, face in asserting their rights.[18] As "the poorest, least educated, and largest minority in America" people with disabilities have enormous difficulty obtaining legal representation.[19] Without a damages remedy available to afford tangible relief, those who experience even the most egregious discrimination have little reason to press their cause. This is all the more true in cases where discrimination is suffered at the hands of government officials, given added disincentives to litigate against sovereign entities.[20] Thus, without damages as an incentive for

17 *See, e.g.*, Senator Cranston's observation during the Senate debates over the 1978 Amendments to the Rehabilitation Act, in which he noted that "Private enforcement of these title V rights is an important and necessary aspect of assuring that these rights are vindicated and that enforcement is uniform." 124 Cong. Rec. 30,346 (1978) quoted in *Doe v. Attorney General*, 941 F.2d 780, 792 (9th Cir. 1991).

18 Given the costs attendant to litigation, this Court has recognized that poverty is an extreme barrier to the enforcement of basic civil rights. *See, e.g., City of Riverside v. Rivera*, 477 U.S. 561, 577 (1976).

19 *See* S. Rep. No. 116, 101st Cong., 1st Sess. 9 (1989) (quoting President George Bush).

20 These disincentives include the need to address administrative prerequisites, and defenses and immunities unique to litigation involving a federal party, which may necessitate additional attorney work hours.

individual enforcement, Section 504's promise of federal nondiscrimination rings hollow as a practical matter.

Lastly, damages are often the only vehicle for affording whole, or even adequate, relief to victims of federal discrimination, especially where equitable relief provides no relevant remedy for the individual. Both Congress and the Courts have recognized that administrative remedies and prospective injunctive relief often fail to address the individual's particular circumstance.[21] Moreover, even in situations in which equitable relief is responsive to an individual injury, it cannot provide full compensation for the inherent harm that accompanies civil rights violations. While compensatory damages cannot eliminate the anguish that attends discrimination, they are society's only way to provide redress for the injuries resulting from illegal discriminatory treatment, exclusion and lost opportunities.

CONCLUSION

It is simply not plausible, given the language of Section 504 as amended in 1978 and 1986, that Congress intended the federal government to be exempt from

21 *See, e.g., Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 76 (holding monetary damages available in a Title IX case that came to judicial resolution only after the student had left the school system: "equitable remedies...are clearly inadequate....prospective relief accords her no remedy at all. The government's answer that administrative action helps other similarly-situated students in effect acknowledges that its approach would leave petitioner remediless.").

paying monetary damages to those whom it harms through disability-based discrimination. The D.C. Circuit's judgment to the contrary should be reversed.

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